Titian Desa Sdn Bhd & Anor v Akberdin bin Hj Abdul Kader

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1746–10 OF 2014
DAVID WONG, VERNON ONG AND ZAMANI A RAHIM JJCA
29 JUNE 2015

Companies and Corporations — Lifting of corporate veil — Piercing of corporate veil — Trial court decided second defendant personally liable as alter ego of first defendant — Whether allegations of piercing of corporate veil pleaded by plaintiff

Legal Profession — Remuneration — Counsel's fees — Plaintiff in court below claimed legal fees amounting to 8% of settlement sum from defendants pursuant to oral agreement between parties — Trial court held that there was no oral agreement but allowed plaintiff's claim — Defendants appealed against decision — What was plaintiff's basis for claim of legal fees, whether based on oral agreement between parties or gross sum bill — Whether plaintiff entitled to legal fees — Whether trial court right in its finding

The first defendant in the court below ('the first appellant') engaged the plaintiff in the court below ('the respondent') to act as its counsel in Kuala Lumpur High Court suit ('the suit') to seek a mandatory order compelling SSF Construction Sdn Bhd ('SSF') to provide documents for inspection. A consent order for such inspection and access to the documents was obtained. The plaintiff continued to act as counsel for the first defendant for which they entered into fees agreement. In that capacity, the plaintiff had entered into a series of settlement negotiations with SSF's solicitors but unsuccessful. Consequently, the first defendant entered into direct negotiations with SSF and settled the matter. The suit was later withdrawn. In the case before the trial court, the plaintiff sued the defendants for his legal fees amounting to RM5,560,000 which he asserted was agreed between the parties to a sum equivalent to 8% of the settlement sum of RM68,500,000 ('the said fees'). The first defendant counterclaimed and sought a declaration to nullify the agreement between the first defendant and the plaintiff on the said fees. The trial court allowed the plaintiff's claim against the first and second defendants and dismissed the plaintiff's claim against the third defendant, hence these appeal and cross-appeal by both parties. The trial court also decided that the second defendant was personally liable on the bill as he was the alter ego of the first defendant. The preliminary issue for determination was what was the basis of the plaintiff's claim for the legal fees of RM5,560,000.

Held, allowing the defendants' appeal with costs of RM40,000 here and below

and dismissing the plaintiff's cross-appeal:

(1) The plaintiff's pleaded case was that there was an oral agreement between the plaintiff and the first defendant whereby the first defendant agreed to pay the plaintiff the agreed fees of RM5,560,000. The plaintiff's case was not an action on a gross sum bill. Thus, learned counsel's arguments relating to the plaintiff's action on the gross sum bill was not only misconceived; it was also immaterial to the present appeal (see paras 13 & 16–17).

(2) The learned judicial commissioner ('JC') ought to have dismissed the plaintiff's claim on findings that (a) there was no oral agreement; and (b) the second and third defendants did not give any guarantee to the plaintiff. In addition, there was no evidence to support the learned JC's finding that the suit was settled at a sum not lower than RM68,500,000. Further, the learned JC was effectively upholding a contingency fee agreement which was not permitted in law in awarding the plaintiff the sum of RM5,480,000 being a sum equivalent to 8% of the settlement sum (see para 19).

(3) The decision of the learned JC in lifting the corporate veil was not consonant with facts and pleaded case. The plaintiff's pleaded case was grounded on contract and was not on fraud by the first and second defendants. It is settled law that any allegations of piercing the corporate veil must be specifically pleaded (see para 20).

[Bahasa Malaysia summary

Defendan pertama di mahkamah bawahan ('perayu pertama') telah melantik plaintif di mahkamah bawahan ('responden') untuk bertindak sebagai peguamnya dalam guaman Mahkamah Tinggi Kuala Lumpur ('guaman tersebut') bagi memohon perintah mandatori mendesak SSF Construction Sdn Bhd ('SSF') untuk mengemukakan dokumen-dokumen untuk siasatan. Perintah persetujuan untuk siasatan dan akses kepada dokumen-dokumen telah diperolehi. Plaintif terus bertindak sebagai peguam defendan pertama yang mana mereka telah memasuki perjanjian yuran. Dalam kapasiti tersebut, plaintif telah memasuki beberapa siri rundingan penyelesaian dengan peguamcara SSF tetapi tidak berjaya. Akibat itu, defendan pertama telah memasuki rundingan langsung dengan SSF dan telah menyelesaikan perkara itu. Guaman itu telah ditarik balik. Dalam kes di hadapan mahkamah perbicaraan, plaintif telah menyaman defendan-defendan untuk yuran guamannya berjumlah RM5,560,000 yang dihujahkannya telah bersetuju antara pihak-pihak untuk jumlah sama kepada 8% daripada jumlah penyelesaian RM68,500,000 ('yuran tersebut'). Defendan pertama telah menuntut balas dan memohon satu deklarasi untuk membatalkan perjanjian antara defendan pertama dan plaintif berhubung yuran tersebut. Mahkamah perbicaraan telah membenarkan tuntutan plaintif terhadap

defendan-defendan pertama dan kedua dan menolak tuntutan plaintif terhadap defendan ketiga, justeru rayuan dan rayuan balas tersebut oleh kedua-dua pihak. Mahkamah perbicaraan juga memutuskan bahawa defendan kedua bertanggungjawab secara peribadi berhubung bil kerana dia adalah alter ego defendan pertama. Isu awalan untuk ditentukan adalah apakah asas tuntutan plaintif untuk yuran guaman RM5,560,000.

Diputuskan, membenarkan rayuan defendan-defendan dengan kos RM40,000 dan menolak rayuan balas plaintif:

(1) Kes plaintif yang diplikan adalah terdapat perjanjian lisan antara plaintif dan defendan pertama di mana defendan pertama telah bersetuju untuk membayar plaintif yuran yang dipersetujui berjumlah RM5,560,000. Kes plaintif bukan tindakan berhubung bil jumlah kasar. Oleh itu, hujah peguam yang bijaksana berkaitan tindakan plaintif berhubung bil jumlah kasar itu bukan sahaja disalah tanggap; ia juga tidak penting kepada rayuan ini (lihat perenggan 13 & 16–17).

(2) Pesuruhjaya kehakiman yang bijaksana ('PK') sepatutnya menolak tuntutan plaintif atas penemuan bahawa (a) tidak ada perjanjian lisan; dan (b) defendan-defendan kedua dan ketiga tidak memberikan apa-apa jaminan kepada plaintif. Tambahan, tiada keterangan untuk menyokong penemuan PK yang bijaksana bahawa guaman tersebut telah diselesaikan pada jumlah yang lebih rendah daripada RM68,500,000. Selanjutnya, PK yang bijaksana secara berkesan menegakkan perjanjian yuran luar jangka yang tidak dibenarkan undang-undang dalam mengawardkan plaintif sejumlah RM5,480,000 sebagai jumlah yang sama dengan 8% jumlah penyelesaian (lihat perenggan 19).

(3) Keputusan PK yang bijaksana dalam mengangkat tabir korporat tidak konsonan dengan fakta dan kes yang dipli. Kes yang dipli oleh plaintif berasaskan kontrak dan bukan fraud oleh defendan-defendan pertama dan kedua. Ia adalah undang-undang tetap bahawa apa-apa pengataan berhubung mengangkat tabir korporat perlu dipli secara khusus (lihat perenggan 70).]

Notes

For cases on counsel's fees, see 9 *Mallal's Digest* (5th Ed, 2015) paras 2061–2065.

For cases on piercing of corporate veil, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 525–526.

Cases referred to

Donald James Rae & Anor v Bruno Sorrentino and another appeal [2015] 2 MLJ 218, CA (refd)

A *Mackt Logistics (M) Sdn Bhd v Malaysian Airline System Bhd* [2014] 2 MLJ 518, CA (refd)
Ong Thean Chye & Ors v Tiew Choy Chai & Anor [2011] 4 MLJ 616, CA (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

B **Legislation referred to**

Legal Profession Act 1976 ss 112, 121(1), (1)(a), (1)(b)

Appeal from: Suit No S-22–808 of 2010 (High Court, Kuala Lumpur)

C *Malik Imtiaz Sarwar (Pavendeep Singh, John Aloysius Skelchy and Natasha Earnest Kunasingh with him) for the appellants.*
Gopal Sri Ram (Jagjit Singh, Rafie Mohd Shafie, Abd Shukor Ahmad, Mohd Reza Mohd Rafie and David Yii Hee Kiet with him) for the respondent.

D **Vernon Ong JCA:**

[1] This appeal relates to a decision of the learned judicial commissioner ('JC') given on 25 September 2014 whereby (i) the plaintiff's claim against the first and second defendants was allowed, (ii) the plaintiff's claim against the third defendant was dismissed, and (iii) the first defendant's counterclaim against the plaintiff was also dismissed.

E

[2] This appeal is brought by the first and second defendants against the part of the decision in allowing the plaintiff's claim against them. The plaintiff is also cross-appealing against the part of the decision dismissing his claim against the third defendant. In this judgment, the parties shall be referred to as they were in the court below.

F

G THE SALIENT FACTS

[3] The plaintiff is an advocate and solicitor. The second and third defendants are directors of the first defendant company.

H

[4] In 2009, the first defendant engaged the plaintiff to act as counsel in a Kuala Lumpur High Court suit ('the suit') to seek a mandatory order compelling SSF Construction Sdn Bhd to provide documents for inspection; at all material times the first defendant's solicitors Messrs Tuan, Mohd Zain & Co was still on record. The professional fees agreed upon was RM50,000. On 28 August 2009, a consent order for such inspection and access to the documents was obtained.

I

[5] The plaintiff continued to act as counsel for the first defendant for which the parties entered into another fee agreement. In that capacity, the plaintiff entered into a series of settlement negotiations with SSF's solicitors.

[6] The negotiations between the plaintiff and SFF's solicitors did not appear to bear fruit. Subsequently, the first defendant and SFF entered into direct negotiations and settled the matter. Thereafter, the suit was discontinued on 14 January 2010.

[7] The plaintiff's claim against the first defendant is for his legal fees amounting to RM5,560,000 which the plaintiff asserts was agreed between the parties to a sum equivalent to 8% of the settlement sum. The second and third defendants are sued as guarantors for the due payment of the fees by the first defendant.

[8] By way of counterclaim, the first defendant is seeking a declaration to nullify the agreement between the first defendant and the plaintiff on the legal fees calculated at 8% of the settlement sum, that the plaintiff is not entitled to enforce the said fee agreement, damages to be assessed, interest and costs.

FINDINGS OF THE HIGH COURT

[9] The findings of the learned JC may be summarised as follows:

(a) there were discussions between the parties about the plaintiff's remuneration for his work as counsel in the suit and in the negotiations with SFF's solicitors;

(b) the letter of undertaking dated 12 August 2009 signed by the second defendant in his capacity as a director of the first defendant company is binding on the first defendant;

(c) the letter of undertaking is not a contingency fee arrangement but a guide in the calculation of the plaintiff's fee for his work;

(d) the plaintiff failed to prove that there was an oral agreement that the fees payable to the plaintiff was a fixed sum of RM5,560,000;

(e) the plaintiff had carried out his work and discharged his duties in line with the second defendant's instructions that secured the highest settlement sum the defendants could possibly attain in the negotiation with SFF;

(f) the suit was settled at a sum not lower than RM68,500,000 which was made possible by the plaintiff's efforts and negotiation skills;

(g) the plaintiff failed to prove that the second and third defendants had given a guarantee to make good to the plaintiff his fees in the event if the first defendant's default;

(h) the plaintiff has proven that the first defendant wrongly terminated the plaintiff's services just shortly before the closure of the suit because it was done by the defendants to avoid paying the plaintiff's 'big' fee;

(i) the learned JC pierced the corporate veil and found the second defendant liable because he was the alter ego of the first defendant company; and

(j) ordered the first and second defendants to pay to the plaintiff an amount equivalent to 8% of RM68,500,000 together with interest and costs; dismissed the first and second defendants' counterclaim.

SUBMISSION OF PARTIES

[10] The arguments of learned counsel for the defendants may be summed up as follows:

(a) the letter of undertaking was not the basis of the plaintiff's claim;

(b) the plaintiff's pleaded case is premised on an oral agreement between the first and second defendants and the plaintiff for the payment of fixed legal fees of RM5,560,000. The learned JC found as a fact that there was no oral agreement for the fixed fee as alleged;

(c) the learned JC also found that the claim against the second and third defendants as guarantors was not proved;

(d) the learned JC should have dismissed the plaintiff's case. Instead, the learned JC went on to find the defendants liable for work done under s 121(1) of the Legal Profession Act 1976 ('the LPA 1976') quantifying the same as the amount equivalent to 8% of RM68,500,000;

(e) as such, the learned JC had granted relief to the plaintiff for a claim that was not pleaded. The learned JC had also effectively upheld a contingency fee arrangement which is prohibited under s 112 of the LPA 1976; and

(f) the learned JC pierced the corporate veil even though no fraud was pleaded and give judgment against the second and third defendants for the amount equivalent to 8% of RM68,500,000 even though the plaintiff had disavowed the 8% agreement.

[11] In reply, learned counsel for the plaintiff argued that the decision of the learned JC should be upheld on the following grounds:

(a) the agreed fee is pleaded in para 13 of the statement of claim;

(b) the invoice issued by the plaintiff for the fees was the basis of the claim;

(c) the second defendant got the plaintiff to do all the work and then went directly to settle the matter with SFF;

(d) the learned JC rightly determined that the plaintiff was responsible for the settlement and went on to find that there was no agreement;

(e) the was no contingency fee agreement because the letter of undertaking was not signed by the plaintiff;

(f) the defendants did not request (a) the plaintiff to deliver a bill containing detailed items in lieu of the invoice, and (b) for a taxation of the invoice within one month from service of the writ. As such s 121 of the LPA 1976 came into operation and the invoice; and

(g) the learned JC after taking into account the evidence and the second defendant's role in the matter was entitled to lift the corporate veil to finds the second defendant liable. In this regard, the learned JC should have also made the third defendant equally liable with the second defendant.

DECISION

[12] In this appeal the preliminary issue to be determined is what is the basis of the plaintiff's claim for the legal fees of RM5,560,000.

[13] The plaintiff's pleaded case is that there was an oral agreement between the plaintiff and the first defendant whereby the first defendant agreed to pay the plaintiff the agreed fees of RM5,560,000 (see para 10 of the statement of claim). Pursuant to the oral agreement the plaintiff issued the invoice dated 6 January 2010 to the first defendant for the sum of RM5,560,000.

[14] Insofar as this preliminary issue is concerned, the learned JC found that the plaintiff failed to prove that there was any oral agreement. This finding has not been challenged by the plaintiff. Before us, learned counsel for the plaintiff accepted the finding that there was no oral agreement for the fees.

[15] However, learned counsel for the plaintiff went on to argue that the plaintiff's claim is premised on the invoice which is a gross sum bill. He argued that the plaintiff's action on the invoice should be allowed on two grounds. First, the defendants did not ask the plaintiff to deliver a bill containing detailed items (s 121(1)(a) of the LPA 1976). Second, the defendants did not request the court for an order that the invoice be taxed (s 121(1)(b) of the LPA 1976). As such, the invoice is undisputed and final pursuant to s 121 of the LPA 1976.

[16] As compelling as the plaintiff's argument is, it runs counter to the fact that the plaintiff's case is not an action on a gross sum bill. The invoice is only mentioned in para 14 of the statement of claim within the context of the alleged oral agreement. According to the notes of proceedings on 17 December 2013 (RR2(9)/324) the plaintiff's learned counsel Mr Jagjit Singh explained as follows:

> Yang Arif, the fact remains that, correct me if I'm wrong, the actions are not based on the bill per se. The bill per se was sent to reflect what was agreed earlier and that was the figure and it was based on our case annexed to that letter. Our basis was what was agreed, that's what Witness has explained and please pay me for what has been agreed. ...

[17] In other words, learned counsel's arguments relating to the plaintiff's action on the gross sum bill is not only misconceived; it is also immaterial to this appeal. Accordingly, the fact that the defendants did not request for a detailed bill or ask for the bill to be taxed is irrelevant and of no significance.

[18] We now turn to the learned JC's decision to award an amount equivalent to 8% of RM68,500,000 as the plaintiff's fees on the basis that the suit was settled at a sum not lower than RM68,500,000 due to the plaintiff's efforts.

[19] In our view, having found that (i) there was no oral agreement, and (ii) the second and third defendants did not give any guarantee to the plaintiff, the learned JC ought to have dismissed the plaintiff's claim. Secondly, there is no evidence in the appeal record to support the learned JC's finding that the suit was settled at a sum not lower than RM68,500,000; in fact the suit was withdrawn as a result of the settlement. Third, the learned JC erred in relying on the rate of 8% specified in the letter of undertaking as a 'useful guide' in the calculation of the plaintiff's fee. We also agree with learned counsel for the defendants that in awarding the plaintiff the sum of RM5,480,000 (being a sum equivalent to 8% of the supposedly settlement sum of RM68,500,000), the learned JC was effectively upholding a contingency fee arrangement; which agreement is not permitted in law (see s 112 of the LPA 1976).

[20] We now turn briefly to the decision of the learned JC in lifting the corporate veil and finding the second defendant personally liable on the bill. We are constrained to hold that the lifting of the corporate veil is not consonant with the facts and the pleaded case. It was not the plaintiff's case that the second defendant defrauded the plaintiff and for that purpose had used the first defendant as an engine of fraud. The plaintiff's case was grounded in contract: the alleged oral agreement between the plaintiff and the first defendant and the alleged guarantees of the second and third defendants. It is settled law that any allegations of piercing the corporate veil must be specifically pleaded (*Mackt*

Logistics (M) Sdn Bhd v Malaysian Airline System Bhd [2014] 2 MLJ 518 (CA); *Ong Thean Chye & Ors v Tiew Choy Chai & Anor* [2011] 4 MLJ 616 (CA)). In short, the learned JC had made a decision on an issue which was not raised by the parties in the pleadings (see *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 (SC); *Donald James Rae & Anor v Bruno Sorrentino and another appeal* [2015] 2 MLJ 218 (CA)).

[21] For the foregoing reasons, we allowed the defendants' appeal with costs of RM40,000 here and below. The plaintiff's cross-appeal is dismissed.

Defendants' appeal allowed with costs of RM40,000 here and below; and plaintiff's cross-appeal dismissed.

Reported by Dzulqarnain Ab Fatar